In the Supreme Court of the United States

October Term — 1977
No. 77-1629

Supreme Court, U. S.
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No. 77-1629

WAYMAN OTIS WILKES,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S OPPOSING BRIEF ON PETITION FOR WRIT OF CERTIORARI

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I

PETITIONER WAS DENIED ASSISTANCE OF COUNSEL, AND HIS CONSTITUTIONAL RIGHT AND PRIVILEGE AGAINST SELF-INCRIMINATION WAS INFRINGED UPON.

A. The Issue Is Not Moot.

The respondent argues that since the trial judge has now suspended the jail sentence imposed on the petitioner as a

condition of probation and has also terminated the provision of probation, that:

> "Petitioner cannot spend any additional time in custody on his conviction . . . ." (Respondent's brief, pages 7-8).

Therefore, petitioner's claim of violation of his Fifth and Sixth Amendment rights is moot. Since the claim does not challenge the validity of petitioner's conviction, only his sentence; in the words of respondent's brief:

> "It simply no longer matters whether petitioner should have been advised by the judge (of his Fifth Amendment rights) and (given the opportunity to be) represented by counsel as he asserts, since even if he should, he cannot be prejudiced because he would spend no more time in custody in the instant case." (Respondent's brief, pages 7-8).

The three cases cited by respondent (page 8 of Respondent's brief) to support this position are not applicable since each of them deals with a situation in which the Court's decision would have no effect on the petitioner. In the instant case, Federal Judge Francis C. Whelan, on May 9, 1978, sentenced petitioner to 15 months of incarceration in a federal prison solely on the basis of the final judgment of conviction in the State Court. Part of this final judgment of conviction is the sentence. This sentence is still extant. By his own words, Federal Judge Francis C. Whelan, when sentencing petitioner on May 9, 1978, stated:

> "THE COURT: Supposing it is (referring to the court granting the instant petition for certiorari), then you come in and ask me to vacate that sentence, the sentence that I'm now going to impose." (Transcript of probation violation hearing in the Federal Court as it appears in the appendix of petitioner's petition page 40, lines 5-7).

Thus, the law applicable to this instant case is as set forth in the case of *Sibron v. New York,* 392 U.S. 40, at page 57, 20 L. Ed.2d 1917, 88 S.Ct. 1889 (1968):

". . . a criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction."

Certainly, the Federal Court's 15 months sentence of petitioner is a serious "collateral consequence." In the event the petitioner's petition is granted, the Judge's reduction is probable because one of the considerations was the sentence of the State Court (appendix to petition, page 55, lines 1-2). If the State Court Judge would have sentenced petitioner to straight probation there is a reasonable argument that Judge Whelan would have agreed that further incarceration was not called for.

B. It Was Improper For The Judge Not To Heed Petitioner's Implied Request For Counsel.

Respondent agrues that:

> "Since the (trial) judge felt that petitioner was not perjuring himself, there manifestly was nothing improper in the judge advising petitioner, in response to petitioner's question, that it was unnecessary for petitioner to have his attorney present in court at that time." (Respondent's brief, page 10).
>
> And that "any testimony petitioner gave at the trial of co-defendant Silverton would not support a conviction or furnish a link in the chain of evidence needed to prosecute petitioner in the

> instant case since prior to testifying at the Silverton trial, petitioner had pleaded guilty herein." (Respondent's brief, page 11).

The above argument avoids the contention of petitioner that the trial judge probably imposed a harsher sentence on petitioner than he would have had petitioner not given the testimony he did at co-defendant Silverton's trial.

The scope of the privilege against self-incrimination is comprehensive, as Justice White, concurring, stated in *Murphy v. Waterfront Commission,* 378 U.S. 52 at page 94, 84 S.Ct. 1518 (1964):

> "The privilege can be used in any proceeding, be it criminal or civil, administrative or judicial, investigatory or adjudicatory, . . . it protects *any disclosures* which the witnesses may reasonably apprehend *could be used in the criminal prosecution* . . . ." (Emphasis Added).

The use of petitioner's responses as a witness by the Court in determining petitioner's sentence in another matter, was a use in a criminal prosecution. This is a logical conclusion because as stated in *In Re Gault,* 387 U.S. 1, at page 49, 18 L. Ed.2d 527, 87 S.Ct. 1428 (1966):

> "The availability of the privilege does not turn upon the type of proceedings in which it is invoked, but upon the . . . exposure which it invites."

In the instant case the use of the testimony exposed petitioner to a greater punishment for the crime of which he was previously convicted.

Such exposure, the greater punishment, is use in a criminal prosecution. To make the privilege efficacious for petitioner, his question to the Judge as to whether he needs

counsel, should have been responded to affirmatively, since petitioner's constitutional rights permits him counsel in situations where his testimony may be used in a criminal prosecution. *Gideon v. Wainwright,* 372 U.S. 335, 9 L. Ed.2d 799, 83 S.Ct. 792 (1963).

C. Counsel For Petitioner Was Not Present During Any Of The Petitioner's Interrogation.

In Footnote 3 of its brief, respondent raises the point that,

> "petitioner had his attorney, Mr. Dobbs, present in court during at least a portion of his testimony in the Silverton trial (Silverton's Reporter's Transcript 1983-1984, 2016A-209)."

An examination of the cited portion of the transcript will verify that Mr. Dobbs was not present during any of the interrogation of petitioner. (This interrogation is reported in the Silverton's Reporter's Transcript, page 1630-2027.) The pages cited by respondent only relate that petitioner's attorney was in the Courtroom at a noon recess when the jury was not present. However, this citation does prove that petitioner's attorney, Mr. Dobbs, could have been available for summons by the Court, or by the petitioner, if given the opportunity, to protect the rights of petitioner while he was on the witness stand.

II

PETITIONER WAS NOT PROPERLY CONVICTED OF CONSPIRACY TO VIOLATE FORMER CALIFORNIA HEALTH & SAFETY CODE SECTION 1310.

A. The California Court of Appeal Was Not Erroneous In Stating That "The Prosecution Of Petitioner Wilkes For Violation Of Former Section 1310 Of The Health & Safety Code Was Commenced Before The Effective Date Of That Section."

Respondent states that the Court of Appeal erred in stating that:

> "The prosecution of appellant Wilkes for violation of former Section 1310 of the Health & Safety Code . . . was commenced before the effective date of that section on January 1, 1974." (Respondent's brief page 14, quoting from the opinion of the California Court of Appeal in the instant case. Said opinion is set forth in the appendix to petition and the quoted portion is set forth at page 9 thereof).

Respondent bases its claim of error on the part of the California Court of Appeal on the fact that the indictment charging petitioner was returned by the grand jury and filed in the trial court on June 14, 1974, whereas the section became effective on January 1, 1974. This assertion by respondent that the aforequoted sentence of the California Court of Appeal is erroneous does not take into consideration the fact that the statute here under consideration, former *Health & Safety Code* Section 1310, was undisputedly repealed effective January 1, 1974, under statute, Chapter 1202, enacted in the regular 1973 Session of the California Legislature.

There is no dispute concerning its repeal date. The contention of respondent it that its effective date is earlier than the activity of petitioner leading to his indictment. However, if the effective date is established as January 1, 1974, then the repeal date of the same date means that in fact, the statute was never extant, and thus, the opinion of the Court of Appeal is correct that:

> "the prosecution of appellant Wilkes for violation of former Section 1310 of the Health & Safety Code . . . was commenced before the effective date of that session on January 1, 1974,"

More importantly respondent does not dispute that the activity for which petitioner Wilkes was being punished occured prior to the enactment of the section he is charged with violating; to wit: the indictment charges petitioner with violation of Section 1310 of the *Health & Safety Code* between July 1, 1973, and December 31, 1973 (Silverton Clerk's Transcript, page 377); but the statute was not in effect until January 1, 1974. Thus, the making of petitioner's conduct prior to January 1, 1974, criminal by virtue of passing a law on January 1, 1974, making it criminal, is an ex post facto law; that is, it is a retroactive criminal statute applying to crimes committed before its amendment, and substantially injuring the accused by punishing an act, innocent when done, or increasing the punishment, or taking away a defense, *(Black's Law Dictionary),* and as such, it is prohibited by the Federal Constitution, Article I, Sections 9 and 10.

Defendant had a right to know in advance of his acts (which took place July 1, 1973 - December 13, 1973; according to the indictment — Silverton Clerk's Transcript page 377) what acts would subject him to criminal penalties.

B. Respondent's Argument As To The Effective And Operative Date Of Section 1310 Of The Health & Safety Code Is Erroneous.

Respondent argues on pages 15 and 16 of its brief that the operative date of Section 1310 of the *Health & Safety Code* was July 1, 1973, because the effective date of the statutes enacted in the 1972 legislative session was not affected by the November 7, 1972 amendment to Article IV of the State Constitution, which provided that all statutes, except those specified, would become effective on January 1 following a 90 day period from the enactment date. (Respondent's brief, page 16). The authority that respondent cites for this argument is a 1973 opinion of the California Attorney General (page 56 Ops. Cal. Atty. Gen. 176-180), which opinion is based upon the logic that if such a difference were not concocted, the results would be, according to the writer of the opinion, different from the legislative intent.

The opinions of the California Attorney General are not of the weight or authority as those of the California Courts. *Bodinson Manufacturing Company v. Employment Com.* 17 Cal. App. 321, 109 P.2d 935. Expressly and specifically contrary to the 1973 opinion of the California Attorney General on the point here in contention is the subsequent opinion of the California Supreme Court in the case of *Fields v. Eu,* (1976), 18 Cal.3d 322, 134 Cal. Rptr. 367, 566 P.2d 729. This case states:

> *"Prior to the 1973 revision of the legislative article,* new statutes took effect 90 days after adjournment (former Article IV, Section I). In the case of regular session, this meant the statutes became operative in mid-September; . . . In 1972, the legislative article was amended to provide, inter alia, that new statutes do not take effect until the January 1 following the 90 day period after their enactment (Article IV, Section VIII. Subd.(c)(1))." (18 Cal.3d 334).

This writer italicized the words in the above quote to emphasize that the opinion of the California Supreme Court in *Fields v. Eu, supra,* expressly stated that after the 1972 revision of the legislative articles (Articles I, Section VIII(c)(1)), of the *California Constitution*, the new statutes thereafter passed took effect according to it. The unequivocal nature of this expression is further emphasized by footnote 14 in the same paragraph from which the above quote was extracted *(Fields v. Eu, supra,* at page 334.):

> "14. Thus, prior to 1972, a statute enacted . . . took effect in that year . . . but after 1972 a statute enacted . . . does not take effect until January 1 of the following year . . . "

Hence, the above demonstrates that former Health & Safety Code Section 1310 did not take effect until January 1, 1974; the same day that its repeal became effective under statute Chapter 1202, enacted in the regular 1973 Session of the California Legislature, and thus could not apply to petitioner's activity.

C. The Instant Case Is Governed by the Mandate Of the Universal Common Law Rule That When The Legislature Repeals A Criminal Statute, Said Action Requires the Dismissal Of A Pending Criminal Proceeding Charging Such Conduct.

Respondent seeks to distinguish this case as not applicable to the mandate of "a universal common law rule that when the legislature repeals a criminal statute . . . the action requires a dismissal of a pending criminal proceeding charging such conduct . . . " *(Bell v. Maryland,* 378 U.S. 336, 340, 12 L. Ed.2d 822, 826, 84 S.Ct. 1814 (1964)). The distinction argued by respondent is based on the proposition that "the legislation which repealed former Section 1310 was tandem to that which incorporated its provisions under new Section 1508." (Respondent's brief, page 19). This proposition has been extolled by respondent's brief as extinguishing the universal common law requiring remission on two bases:

> 1) "That the California Legislature acted in reliance on the general savings clause in California Government Code Section 9608." (The authorities cited by respondent's brief for this argument is *People v. Kuhns,* (1976) 61 Cal. App.3d 735, 760, 132 Cal. Rptr. 725, 740 (Respondent's Brief 20).

However, the opinion in *Kuhns, supra,* specifically declined to explore the proposition of whether or not *California Government Code* Section 9608 abrogated the common law rule requiring a dismissal of criminal proceedings not yet final when based on an abolished statute. (See *People v. Kuhns, supra,* bottom of page 760-top of page 761).

The opinion of the California Supreme Court in *People*

v. Rossi (1976) 18 Cal.3d 295, 134 Cal. Rptr. 64, 555 P.2d 1313, decided subsequently to the decision in *Kuhns, supra,* did explore that issue and, as set forth in appellant's opening brief at pages 18-19, found that California Government Code Section 9608, did not abrogate the common law rule requiring a dismissal of criminal proceedings not yet final and based on an abolished statute.

2) Respondent's brief argues at page 20, that when a statute, although new when formed, re-enacts an older statute without substantial change, even though it repeals the older statute, the new statute is but a continuation of the old. To come within this argument, respondent's brief equates Section 1310 with Section 1508. However, *Health & Safety Code* Section 1508 was in effect under the section designated as *Health & Safety Code* Section 1502 at the same time as former *Health & Safety Code* Section 1310 was in effect; both Sections 1508 and 1310 being in effect at the time that defendant was charged with having violated Section 1310.[1]

A look at *Deering's Annotated Calfornia Codes,* the latest edition, shows the following: (a) As to present *Health & Safety Code Section* 1508:

> *"Prior law:* Former Section 1502 as added by stats. 1947 C.H.1462 § 2."

(b) As to present *Health & Safety Code* Section 1502:

> *"Former Section:* Former 1502, similar to present Section 1508, was added by stats. 1947 C.H.1462, and repealed by stats. 1973 C.H.1203 § 3."

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[1]For the complete text of Health & Safety Code sections: 1310 (former); 1250 (former); 1508; 1502; see the appendix to this brief.

From the above-quoted history of *Health & Safety Code* Section 1508, it is seen that it was in effect in the *Health & Safety Code* of the State of California under the designation, "Section 1502" since September 1947 and that it was not repealed until 1975. Hence the argument of respondent's brief that *Health & Safety Code* Section 1508 supplanted former *Health & Safety Code* Section 1310, cannot stand, since both sections were in effect during the time the defendant allegedly violated *Health & Safety Code* Section 1310 (Section 1508 was in effect under the designation Section 1502).

Also the activities proscribed by former *Health & Safety Code* Section 1310 are significantly different when measured in the context of the instant case, than the activities proscribed by *Health & Safety Code* Section 1508. A comparison of the repealed *Health & Safety Code* Sections 1310 and 1250, with *Health & Safety Code* Sections 1508 and 1502, which respondent's brief contends re-enacts Sections 1310 and 1250, is convincing that the prosecution of petitioner is barred by the former *Health & Safety Code* Section 1310. As can be seen by looking at the two repealed sections in their entirety, nowhere does former *Health & Safety Code* Section 1310 refer to "home finding agencies" other than as it is used in Section 1250(a) with reference to "mentally disordered persons, mentally retarded persons, and other competent persons." Sections 1250(c), 1250(d), and 1250(e) are not encompassed within the terms of Section 1310. On the other hand, *Health & Safety Code* Section 1508 does incorporate within it via *Health & Safety Code* Section 1502 the word "home finding agency," but not the words "facility" or "hospital," as those words are defined in former *Health & Safety Code* Section 1250. Thus former *Health & Safety Code* Section 1310 as written and charged, does not involve the offense of operating a "home finding agency" but rather, a "facility" or a "hospital" as those terms are defined in former *Health & Safety Code* 1250(a) and (b), and of "caring for persons not related to him by blood or affinity within the second degree." None of these activities have been carried over in substantial form by *Health & Safety Code* Section 1508, as it is defined in *Health & Safety Code* Section 1502. For example, the word "facility" which appears in *Health & Safety Code* Section 1502 refers to a "family home care facility" as opposed to the use of the word in former *Health & Safety Code* Section 1250, wherein "facility" is defined as follows:

> "(a) 'Facility' means any hospital, institution boarding home or other place for the care of persons, home finding agencies, and establishments and institutions, for the reception and care of the mentally disordered persons, or mentally retarded persons and other incompetent persons."

CONCLUSION

Thus, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeal of the State of California, Second Appellate District, Division 1.

Respectfully submitted,

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APPENDIX

FORMER CALIFORNIA HEALTH AND SAFETY CODE SECTION 1250

§ 1250.

As used in this chapter:

(a) 'Facility' means any hospital, institution, boarding home or other place for the care of persons, homefinding agencies, and establishments and institutions, for the reception and care of the mentally disordered persons, mentally retarded and other incompetent persons.

(b) 'Hospital' means any institution, place, building, or agency which maintains and operates organized facilities for one or more persons for the diagnosis, care, and treatment of human illness, including convalescence and including care during and after pregnancy, or which maintains and operates organized facilities for any such purpose, and to which persons may be admitted for overnight stay or longer. 'Hospital' includes sanitarium, nursing home, and maternity home.

(c) 'Institutions, boarding homes, and other places for the care of persons' are facilities which provide non-medical board, room and care, or board and care or room and care.

(d) 'Homefinding agencies' means persons engaged in finding homes for children under 16 years of age, or placing such children in any home or other place either for temporary or permanent care or adoption.

(e) 'Establishments and institutions for mentally disordered persons, and other incompetent persons' include every hospital, sanitarium, boarding home, or other place receiving or caring for any of the persons enumerated in this subdivision."

FORMER CALIFORNIA HEALTH AND SAFETY CODE SECTION 1310

§ 1310. Persons, entities, and activities subject to license requirement.

No person shall establish, conduct or maintain in this state any facility without first obtaining a license therefor as provided in this chapter and no political subdivision of the state, or other governmental agency within the state shall establish, conduct or maintain in this state any hospital without first obtaining a license therefor as provided in this chapter.

No person shall receive or care for persons not related to him by blood or affinity within the second degree without first obtaining a license therefor as provided in this chapter.

CALIFORNIA HEALTH AND SAFETY CODE SECTION § 1502

§ 1502. Definitions

As used in this chapter, "community care facility" means any facility, place, or building which is maintained and operated to provide nonmedical residential care, day care, or homefinding agency services for children, adults, or children and adults, including, but not limited to, the physically handicapped, mentally impaired, or incompetent persons, and includes the following:

(a) "Residential facility" means any family home, group care facility, or similar facility determined by the director, for 24-hour nonmedical care of persons in need of personal services, supervision, or assistance essential for sustaining the activities of daily living or for the protection of the individual.

(b) "Day care center" means any facility which provides nonmedical care to persons in need of personal services, supervision, or assistance essential for sustaining the activities of daily living or for the protection of the individual on less than a 24-hour basis.

(c) "Homefinding agency" means any individual or organization engaged in finding homes, or other places for placement of persons of any age for temporary or permanent care or adoption.

CALIFORNIA HEALTH AND SAFETY CODE SECTION 1508

§ 1508. Necessity of Licensing; temporary permit; county facilities

No person, firm, partnership, association, or corporation within the state shall operate, establish, manage, conduct, or maintain a community care facility in this state, without first obtaining a license therefor as provided in this chapter.

No person, firm, partnership, association or corporation within the state shall provide specialized services within a community care facility in this state, without first obtaining a special permit therefor as provided in this chapter.

Except for a juvenile hall operated by a county, this section shall apply to community care facilities directly operated by a county. Each county operated community care facility shall comply with the standards established by the director for community care facilities.